No. 4571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. BROOKS and GEORGE WEBB,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR

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FILED

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The information in the court below charged Leo E. Larke, J. C. Brooks, George Webb and Fong Hay with violations of the National Prohibition Act in three counts.

The first count alleges that defendants on or about September 24th, 1924, maintained a common nuisance by unlawfully keeping for sale certain intoxicating liquors, described in the information, at 720 K Street, Sacramento, California.

The second count alleges that on the same date defendants unlawfully possessed the same liquors at the same place.

The third count alleges that defendants on the 17th day of September, 1924, sold two drinks of whiskey at the same place.

This information is not made upon the official oath of the United States Attorney or his deputy, but is purported to be based upon and made certain by attached affidavits by reference incorporated therein. And the information is not signed by anybody.

There is no affidavit as to the first and second counts.

An affidavit purports to support the third count, but it alleges a different offense, *i. e.*, maintenance of a

nuisance by sale of two drinks of whiskey. It is made by a person named I. H. Cory who was not present at the time of the alleged sale and had no actual, personal knowledge of the matters alleged.

(Transcript, pp. 2-3-4.)

The Commercial Bar, leased to the defendant, Brooks, occupies part of the first floor of the building at 720 K Street, Sacramento, and extends about thirty feet along the east side of the building. Opposite is the lunch counter or grill, and to the rear is a space used by patrons of the grill for their meals. In connection with the grill is a kitchen at the far end, and a stairway descends from the back door of the kitchen to the alley south of the building. Another stairway descends from the interior of the first floor to the basement. The part of the first floor occupied by the grill and the kitchen is leased to persons not here concerned.

Prohibition Agent Felt, so he testified, purchased two drinks of whiskey from the defendant, Webb, on the 17th of September, 1924, and at the time had some conversation with Webb about the whiskey. The other defendants were not then present, and neither was the affiant, Cory.

(Transcript, p. 29.)

On the 24th of September, 1924, Prohibition Agents Cory, Felt and Camplong raided the place, by virtue, they testified, of a warrant to search the Commercial Bar. They found no liquor about the bar. In the basement Cory encountered a Chinaman, Fong Hay,

who opened a storeroom where were 39 barrels of bottled beer.

(Transcript, p. 32.)

Shortly afterwards Cory and Camplong met Larke in the alley, carrying two suit cases or grips which they demanded that he open. They refused to show him any warrant, arrested him and forcibly seized the grips (Transcript, p. 33) and found therein two bottles of Scotch whiskey, one and one-half pints of jackass brandy, two quarts of the same and five empty bottles. This was all of the liquor described in the information, except the barrels of bottled beer.

At the close of the Government's evidence and at the close of all the evidence motions to instruct the jury to find Brooks not guilty were denied.

Brooks was convicted on all three counts, Larke on the second count, and Webb on the third count.

Motions for new trial and motions for arrest of judgment based upon the defects in the information were denied.

Brooks was sentenced to pay a fine of $1000 and to be imprisoned for one year on the first count, and to be imprisoned for six months on the third count. Webb was sentenced to imprisonment for six months on the third count of the information.

Brooks and Webb, herein called the defendants, bring error.

SPECIFICATIONS OF ERROR.

I.

The information is so defective as to be wholly void.

Consequently the court below never acquired jurisdiction and the motion in arrest of judgment should have been granted.

> Webb's Assignments of Error, 1, 2, 3, 4 and 7.
> Brooks' Assignments of Error, 1, 2, 3 and 12.

II.

The court erred in denying the motion to suppress evidence concerning liquors obtained by seizure of Larke's grips.

This motion was made before trial on the ground that said property was taken from said Larke without any search warrant and after unlawful search and seizure, and was based upon an affidavit by Larke reciting that at the time while Larke was standing upon a public street, one Camplong took from affiant's possession one suit case containing the five bottles of liquor and another suit case containing five empty bottles. That the suit cases were closed and their contents could not be seen and that they were taken without warrant and without his consent.

In opposition to the motion and affidavit the Government undertook to justify the search and seizure by oral testimony of the agent Camplong.

This evidence is as follows:

> The Court. Q. What are the facts?
>
> J. S. Camplong. A. On September 24th, 1924, while raiding the Commercial Bar, located at 720 K Street—we had a search warrant for the place, and just before going into the place and executing that search warrant, we saw a man by the name of Larke who later I knew to be Larke, who

when I first saw him was standing at the front end of the building, and the second time I saw him, while searching the place, he was going from the back end of the same building to a garage on the same lot the building is located on, and for which we had a search warrant. He was carrying a hand bag and went into the garage, and I went to the back end of the garage and looked through a crack in the garage and saw him placing some bottles in the bag. As he came out of the garage door he placed the bags in the car. I stepped up and wanted to know what he had in the bags, and that we had, I said to him we had a search warrant covering all——

The Court. Motion denied.

The only other evidence in the record concerning the search warrant is as follows:

Cory. I had occasion to visit the Commercial Bar and Grill, 720 K Street, on that day. At nine o'clock in the morning I had a search warrant calling for the search of the Commercial Bar on K Street, and I went there with Agents Felt and Camplong and an employee of the District Attorney here. (Transcript, p. 31.)

Camplong. On the morning of September 24th, 1924, at about 9:00 A. M. a search warrant was handed to Mr. Cory and he asked me to accompany him upon a raid. He led us to 720 K Street. (Transcript, p. 40.)

Camplong. Cory demanded the bag and Mr. Larke wanted to know if we had a search warrant for it. Cory told him that would be settled later. (Transcript, p. 42.)

Webb's Assignment of Error No. 5. Trancript, pp. 78-79.

Brooks' Assignment of Error No. 8. Transcript, p. 83.

III.

It was error for the court below to deny motions made during the trial to strike out evidence concerning the liquor obtained by the search and seizure, as shown by the following narrative:

> CORY. At nine o'clock in the morning of September 24th, 1924, I had a search warrant calling for search of the Commercial Bar on K Street and went there with Felt and Camplong and an employee of the District Attorney. I instructed Felt to take care of the bar and that Camplong and myself would search the rest of the premises. I walked down the back stairs to the basement. I found a Chinaman in the basement, and said, "Well, John, where is all the booze in the place?" He said, "Well, there isn't any." *When I searched the Chinaman,* I found nothing on his person. He was standing by a solid partition of rough lumber, with a door and padlock in it. I told him to get me the key and he took the key from a nail around the side and opened the padlock and inside I found 39 barrels such as are used to contain sugar, 27 of the barrels were filled with pint bottles of beer and labelled beer, covered with rice hulls, packed that way and 2 barrels were partially empty, there were about 144 bottles in each barrel. That is one of the bottles taken from the barrels. I took samples from the barrels there and had them submitted to the city chemist to analyze and it was found they contained 3.94% of alcohol.
>
> Mr. JOHNSON. We offer it for identification at this time.
>
> CORY. We made a further search; and Agent Camplong left me and went back into the lot. I think we had only one flashlight with us. I didn't see him for some time and was about to go upstairs when he called to me. He was standing in the alley, by a small garage, a corrugated iron building which would hold just one car, and a car

was out in the street pointing towards Seventh Street. Mr. Larke was standing there and *had a couple of grips in his hands.* Mr. Camplong told me at that time in the presence of Mr. Larke, he said: "I have got the stuff." I says to Larke, "Let me see what you have in those grips?" He said, "Have you got a search warrant?" and with that he pulled back and you could hear the bottles rattle in the grip. I said: *"I put you under arrest right now,* the place is being searched by a warrant which is on the bar in front, the barroom." And I *took the grips away from him* and opened them myself, and in one of the grips we found two quarts of Scotch whisky labelled "Caledonia."

Mr. Johnson. With your Honor's permission may I have this marked as Government's Exhibit Two, the grip with this in it?

The Court. Yes.

Witness Cory (continuing). There were two quarts of Scotch whiskey, Caledonia Scotch, one-half pint bottle of jackass brandy; three quart bottles of either jackass brandy, or rectified, that is, home-made whiskey; it was not distilled, and was not the ordinary type of jackass brandy; and we took Larke into custody and took him upstairs where they already had the Chinaman.

Mr. Russell. We move to strike out the testimony of the witness in regard to the finding of various bottles of liquor in the suitcases, just testified to, on the grounds heretofore urged for the suppression of the evidence.

The Court. Motion denied. (Transcript, pp. 43-34.)

A. J. Afleck. I made an analysis of the sample handed me and found it contained 3.94 per cent of alcohol. (Transcript, p. 38.)

Hugo Ringsttom. I analyzed this (Exhibit No. 2). It contains distilled spirits commonly known as jackass brandy.

That bottle (Exhibit No. 4) contains imitation whiskey, by imitation whiskey I mean colored alcohol with water in it.

Mr. JOHNSON. May I have the exhibits admitted in evidence, numbered 1 and 2?

Mr. RUSSELL. May it please the Court that will be subject to the objection heretofore urged in reference to Larke, and also the whiskey exhibits which I think are two; and the further objections urged on behalf of defendants, Webb and Brooks, that the same are incompetent, irrelevant, immaterial and not touching on the issues affecting this case as to their guilt or innocence.

The COURT. Objection overruled.

J. S. CAMPLONG. My testimony as to what happened in the basement would be the same as that of the witness Cory. Not finding any liquor other than the beer I extended my search to the back of the premises. As I was going out of the door leading to the basement to the back end of the building I noticed a man whom I had seen as we were entering the place to search it, going from the kitchen. He went around the garage and was out of my sight. I waited a few minutes and proceeded to the garage. First of all as I entered the Commercial Bar to make the raid I saw the man out in front where the bootblack stand it, and when I went in and proceeded with the raid and got to the back of the building several minutes afterwards I again saw the same man. When I first saw him with the hand bag he was coming from the kitchen door going to the garage.

He had one of the grips in his hand; he was only carrying one grip at the time. He went to the garage and was out of my sight then. I waited a few minutes and later I went to the corner of the garage and could hear bottles crackling and hasty movements in there. There was also the buzz of a machine like it was running.

Then I went around to the front of the garage which leads out into the alley, and the machine was standing in front of the garage or rather in the alley facing this street out here, Seventh Street; the motor was running and Mr. Larke came from the corner of the building of the garage and placed this suit case in the back end of the car with another suit case; that is, the hand bag, or rather both hand bags; and as he was in the attempt of locking the door of the garage, I stepped up and began to question him as to what he had in that suitcase, and he gave me the story of being a farmer and going out to his ranch, and I told: "Everybody is temporarily detained here, because this place is being searched, and every bag and everything else is covered by the search warrant on this property—by this search—and I will search everything." And I took up one of the bags out of the car and gave it a shake, and there was a clinking of bottles, and I called Agent Cory to witness what was there. As Mr. Cory came up, I said to Mr. Cory, "We have the liquor here, I believe." And Mr. Cory demanded the hand bag, and Mr. Larke wanted to know if we had a search warrant for it. "That would be settled later," he told him and to go inside. We opened the bag and found liquor in it.

CAMPLONG (upon cross-examination). I assisted in the search of the entire premises and except for the whiskey taken from Mr. Larke I found no liquor except the beer in the basement, nothing but the odor of intoxicating liquor.

Mr. RUSSELL. Incidentally, your Honor, I would ask permission to urge my motion to strike out his testimony on the same grounds as heretofore urged and on the ground that the seizure was illegal.

The COURT. Motion denied.

Webb's Assignment of Error No. 5.

Brooks' Assignments of Error Nos. 17 and 18.

The foregoing are urged by both defendants.

The following specifications are separately urged by Brooks.

IV.

It was error to allow testimony as to a conversation between Webb and Felt concerning whiskey, which conversation took place in Brooks' absence.

> E. G. Felt. I had some conversation with Mr. Webb at the time I purchased the liquor. There was no one present except Mr. Webb and myself and a man unknown to me.
>
> Mr. Russell. I wish to make objection on behalf of Brooks and Larke that it will be hearsay to them.
>
> The Court. The objection will be overruled.
>
> Witness. We were discussing the merits of the whiskey and he said it was Pebble Ford whiskey that he sold me. I asked him if it was hard to get; and he said that they had been fortunate enough to get a few cases. I bought two drinks and paid fifty cents each for them.
>
> Mr. Russell. We urge our original objection and the objection is made as to each defendant separately that it would be hearsay and not binding as to them, that is, the other two defendants.
>
> The Court. Objection overruled.
>
> Brooks' assignments of error No. 19 and 20.

V.

The Court erred in denying the motions to instruct the jury to find Brooks not guilty, made on the ground of the insufficiency of the evidence.

The whole case shows a most remarkable lack of evidence against Brooks, and we set forth below all

we can glean from the record showing his connection with the matter.

> Cory. We then searched around a little more back of the bar and found the city license, issued by the City of Sacramento to conduct the place in the name of J. C. Brooks. (Tscpt. pp. 34-35.)
>
> Larke. I leased the place to Mr. Brooks. Mrs. Ida Godwin owns the property at 720 K street. She leases to Matthew J. Rainey and myself. There are different enterprises conducted there. I lease the restaurant to one set of people, and sublet the bootblack stand and have written permission from the landlord to sublet the bar part to Mr. Brooks. On the 24th day of September, 1924, the portion known as the bar was leased to Mr. Brooks. I have no interest in it whatsoever. The license was changed from my name to Brooks on November 15, 1922. That is when he first started paying rent. (Tscpt. p. 61.) Brooks pays $206.00 a month rent. (Tscpt. p. 64).
>
> Brooks' assignment of error No. 9.

VI.

During his argument to the jury the Deputy United States Attorney was guilty of prejudicial misconduct.

> Mr. Johnson. Mr. Brooks was not called; but you heard from Mr. Webb here what he had to say.
>
> Mr. Russell. I object to the District Attorney commenting on the fact that the defendant Brooks was not called to the stand in his own behalf, and I assign it as misconduct on the part of the District Attorney.
>
> The Court. You are within your rights. Gentlemen of the jury, you will hereafter be instructed that the failure of Mr. Brooks to take the stand

is not in any way to be considered against him; that is his privilege.

Brooks' assignment of error No. 23.

ARGUMENT.

First. We contend that the information is fatally defective and conferred no jurisdiction upon the court below.

The general rule may well be that defects in the information should be pointed out by demurrer or motion to dismiss before trial; but we have found no case where this rule has been applied in an instance where the information was not made upon the official oath of the United States Attorney was not signed, and was not supported by affidavit. We take it that the Constitution gives the accused the right to confront his accuser; and it follows that there must be an accuser to be confronted; that there must be some one responsible for the accusation, and against whom redress may be sought.

Informations have been made instruments of oppression. Though allowed in misdemeanor cases, they have been forbidden in felonies; and it has always been held that they must be under sanction, either of the official oath of the United States Attorney or deputy, or by the oath to affidavits made in support of the information by persons having actual and personal knowledge of the facts set forth.

These remarks apply to the first two counts, and in addition we call to the court's attention that the affidavit to the third count is hearsay, being made by Cory, who was not present at the time of the

transactions related in the affidavit. This was not discovered before trial and no motion to quash or to dismiss could have been made on this ground.

The third count is open to the further objection that the affidavit attached thereto and incorporated therein charges a different offense and it well calculated to leave in doubt the particular character of the charge. It has been recently held that such a defect may be raised by motion in arrest of judgment.

U. S. vs. *Craig,* 1 Fed. 2nd 482.

The third count is also bad in that it does not allege to whom the alleged whiskey was sold.

Carpenter vs. *U. S.,* 1 F. (2nd) 314.

There can be no conviction or punishment for a crime without a formal or sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. (*Weeks* vs. *U. S.,* 216 Fed. 293.)

All arbitrary informations, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations except those supported by proof on oath are barred by this constitutional provision (4th amendment) from permissible procedure. (*U. S. vs. Tureaud,* 20 Fed. 621.)

"Probable cause supported by oath or affirmation" means oaths or affidavits of those persons who, of their own knowledge, depose to the facts which constitute the offense. (*U. S. vs. Turead,* 20 Fed. 621.)

While an information filed by the United States Attorney, under the sanction of his official oath, and without verification would be sufficient in certain cases, an information not so filed, but expressly stating on its face that it was made on the oaths of the several parties were attached, is not sufficient, unless the affidavits could be considered as sufficient to support the charge. (*U. S.* vs. *Schallinger Prod.* Co., 230 Fed. 290.

SECOND. The motion to suppress the evidence of intoxicating liquors obtained by the search and seizure of Larke's grips should have been granted.

The evidence given by Camplong on the motion falls short of establishing a legal search. There is nothing there or elsewhere in the record to show that the warrant was ever shown to any of the defendants or that any copy of the warrant was given to any person or left at the place searched, or that any receipt for the property taken was ever given to anybody.

The Government is required to justify search and seizure.

U. S. vs. *Kelliher,* 2 Fed. 2nd 935.

Search warrants and proceedings thereon must be strictly legal.

Giles vs. *U. S.,* 284 Fed. 208.
Entick vs. *Carrington,* 19 How. St. Tr. 1030.
Boyd vs. *U. S.,* 116 U. S. 616, 29 L. Ed. 746.
Amos vs. *U. S.,* 65 L. Ed. 654.

When an officer takes property under the warrant he must give a copy of the warrant, together with a receipt for the property taken, specifying

it in detail, to the person from whom it was taken by him, or in whose possession it was found, or, in the absence of any person he must leave it at the place where he found the property.

Section 12, Act June 15, 1917.

A search of a place not described in the warrant is unreasonable.

Peo. vs. *Castree,* 143 N. E. 112.

A copy of the warrant and receipt for property seized must be given.

Giles vs. *U. S. Sup.*

Evidence obtained by unconstitutional use of search warrants is not admissible.

Murby vs *U. S.,* 293 Fed. 849.

Nowhere in the record is anything to indicate compliance with this essential requirement of the statute. The result is that the court erred in admitting evidence of proceedings under the search warrant and concerning liquors and containers seized.

If statute requiring service of copy of search warrant and receipt for articles taken is not complied with the evidence is inadmissible.

Murby vs *U. S. Sup.*

Paine vs *Farr,* 118 Mass. 74.

Kent vs. *Willey,* 11 Gray (Mass.) 368.

Gibson vs. *Holmes,* 78 Vt. 110, 62 At. 11.....

THIRD. The court below should have granted motions to strike out evidence concerning the liquors obtained by illegal search and seizure.

The rule that courts will not stop a trial to inquire whether evidence was lawfully or unlawfully obtained has no application where it is apparent that there has

been an unconstitutional seizure of the property of accused; and the court should exclude such evidence and any testimony relating thereto, on motion of the accused, made after both property and testimony were introduced against him.

Peo. vs. Castree (Ill.), 143 N. E. 117.
Amos vs. U. S., 65 L. Ed. 654. .

Where the facts were not in dispute, but were disclosed by the testimony of the prohibition agent, the objection tendered no collateral issue of fact, and was therefore not too late.

Giles vs. *U. S.*, 284 Fed. 208.

All of the evidence plainly shows that any search warrant the agents may have had covered only the Commercial Bar, and no assumption may be allowed that this warrant authorized search of the basement or the garage or the grips in Larke's hands. .

As is plainly set forth in the cases cited below, the use of search warrants is restricted by the Constitution so as to forbid search by general warrants so called because they authorized search anywhere for any thing.

> A search to be reasonable and therefore lawful must be confined to the place and the seizure to the things particularly described. If it were not the case the effect would be that a search warrant providing for the search of a particular place would become a general warrant when placed in the hands of government officers.
> *U. S.* vs. *Friedberg*, 233 Fed. 313.

> The searches and seizures forbidden by the constitution are unreasonable searches and seizures; and the means of securing this protection was by abolishing searches under warrants which were called general warrants, because they authorized searches in any place for anything.
>
> *Boyd* vs. *U. S.*, 116 U. S. 616, 29 L. Ed. 746.

A very recent case holds as follows:

> Testimony based upon illegal search is inadmissible. Where there was a warrant for search of a grocery store and agents went up a flight of back stairs and found liquor and stills in a room, their testimony on what they found there was inadmissible over objection.
>
> *Giusti vs. U. S.*, 3 Fed. 2nd 703.

It is plain that the search was expressly made to secure evidence, for the agents could have had no prior knowledge of the beer or of the liquor in Larke's grip.

> Search warrants cannot be issued or served merely for the purpose of securing evidence.
>
> *Gouled vs. U. S.*, 235 U. S. 298, 65 L. Ed. 647.
>
> *Boyd vs. U. S.*, 116 U. S. 616, 29 L. Ed. 746.

It is apparent that at the time Cory knew that he had no right or warrant to detain Larke or to search his grips. On being asked for a warrant, he said: "I put you under arrest right now." Obviously he was trying to effect an illegal search by an illegal arrest. The situation as regards the liquor in Larke's possession is remarkably similar to the conditions in the case of *Snyder* vs. *U. S.* As in the Snyder case, the agents had no knowledge of the liquor,

for all they knew the bottles that Larke had may have all been empty or contained some innoxious fluids. And the case strongly affirms that an officer has no right to stop a citizen on the public street and search his baggage on mere suspicion that he is carrying liquor. The court pertinently observes:

> "If the bottle had been empty or if it had contained any one of a dozen innoxious liquors, the liquors, the act of the officer would admittedly have been an unlawful invasion of the personal liberty of the defendant. The fact that it contained whiskey neither justifies the assault nor condemns the principle which makes such acts unlawful."

Snyder vs. United States, 285 Fed. 1.

FOURTH. The testimony of the conversation between Webb and Felt as to whiskey, in Brooks' absence, should not have been allowed. As to Brooks, this evidence was purely hearsay and it was introduced for no other purpose than to show some assumed complicity between Webb and the other defendants in the sale of the whiskey. It was absolutely inconsequential otherwise.

We believe that there is no exception to the rule that testimony as to statements of persons jointly charged in defendant's absence which were not made in furtherance of any common design is hearsay and inadmissable.

The rule is clearly laid down by the Supreme Court of this state in positive and de finite language:

> It was never competent to use as evidence against one on trial the statements of an accomplice, not given as testimony in the case, nor made in the presence of the defendant, nor during the pendency of the criminal enterprice nor in furtherance of its objects. (*People* vs. *Moore,* 45 Cal. 19.) To hold such testimony admissible would be to ignore the rules of evidence.
>
> *Peo.* vs *Oldham,* 111 Cal. 652-653.

The same rule has been repeatedly re-affirmed and is clearly stated in a later decision:

> Nothing is better established than that the statements by an accomplice after the completion of the offense and which are simply narratives of the events concerning the accomplished crime, are not admissible against the defendant on trial, unless made in his presence.
>
> *Peo.* vs. *Dresser,* 17 Cal. Ap. 27.

FIFTH. The court should hav e instructed the jury to find Brooks not guilty.

If we take all of the evidence in the case, and we are considering not only the testimony directly bearing upon him, but all of the other circumstances which indirectly connect him with the matters disclosed upon the trial, there is presented the following conditions:

Larke sublet the Commercial Bar to Brooks for a rental of $206.00 per month. A license to conduct the place stood in his name. In his absence two drinks of whiskey were sold by Webb to a prohibition agent. It appears that Webb also sold beer there. That some of this beer was unlabeled and sold for a higher price than other kinds also dispensed by Webb at the

place. There is sufficient to show that there was a considerable amount of this kind of beer in the basement and that it was brought up by the Chinaman when Webb called for it. There is no proof that Brooks had any connection with the basement. There is no direct evidence as to the relations between Webb and Brooks. There may be an inference that Webb was employed by Brooks, but that is only an assumption. One assumption can not be founded upon another.

And no inference of Brooks' guilt can be allowed merely upon evidence that Webb sold whiskey.

> The law is well settled that the mere sale of intoxicating liquor by an agent is insufficient in itself to warrant a conviction of the principal.
>
> *In re Souza,* 65 Cal. App. 9.
>
> To render employer responsible for crime of employee he must have directed or incited the violation of the law.
>
> *Fields* vs. *Commonwealth,* 260 SW. 343.
>
> *Grant Bros., Const. Co.* vs. *U. S.,* 232 U. S. 647, 58 L. Ed. 776.

For the same reasons the evidence falls short of establishing that Brooks had possession of any intoxicating liquor.

> The word "possess" means the actual control, care and management, the ownership not being an essential ingredient.
>
> *Blakemore on Prohibition,* Sec. 122, p. 230, citing,

Thomas vs. *State,* 89 Tex. Cr. R. 609, 232 S. W. 826.

Smith vs. *State,* 90 Tex. Cr. R. 273, 234 S. W. 893.

State vs. *Parent* (Wash.), 212 Pac. 1061.

Newton vs. *State* (Tex. Cr. App.), 250 S. W. 1036.

There is no evidence that Brooks had actual care or control or management of any liquor. An inference might be drawn that Webb was employed by Brooks, but that inference alone does not warrant another inference, that unlawful actions by Webb were at Brooks' command or direction. An inference can only be drawn from a fact proven.

And even if it were a proven fact that Webb was Brooks' agent or employee, that, without more, could not make him criminally liable for the unlawful possession or sale of intoxicating liquors.

In re Souza, Sup.

Grant Bros. Const. Co. vs. *United States, Sup.*

All of the circumstances are consistent with Brooks' innocence, and some cases bearing on this point are cited below:

Fact that bottle of whiskey was on the table in the house where defendants lived and that witness took drinks from this bottle is insufficient to show transportation or possession by defendants although the defendants had leased the house.

Huth vs. *U. S.,* 295 Fed. 35.

The presence of liquor outside but near the premises of defendant is insufficient to sustain a conviction.

Troutman vs. *Com.* (Va.), 115 S. E. 693.

There is no evidence worthy of the name that the beer in the basement was of unlawful alcoholic content, although in this respect Cory testified:

> "I took samples from the barrels there and had them submitted to the city chemist to analyze, and it was found that they contained 3.94% alcohol." (Transcript, p. 32.)

While there was no objection that this testimony was hearsay, the positive evidence given by A. J. Afleck, the city chemist, and by the other agent, Felt, show that it is untrue.

Cory also said:

> "That is one of the bottles taken from the barrels." (Transcript, p. 32.)

In regard to this bottle, Afleck testified:

> "I made analysis of the sample of liquor handed me and found it contained 3.94 per cent of alcohol by volume." (Transcript, p. 38.)

In regard to this same bottle, Felt testified:

> "When we made the raid on the Commercial Bar on September 24th I went behind the bar. I found some high proof beer there, that is all the intoxicating liquor I found there. It is the same as is admitted in evidence. That is the bottle there." (Transcript, p. 38.)

These witnesses testified on behalf of the Government and there can be no doubt that the bottle referred to and analyzed by Afleck was the same that was found by Felt back of the bar.

Bearing in mind that the whole case against Brooks rests upon some inference that Webb was his employee and agent and hence Brooks was responsible for his

acts, it is difficult to conceive of any manner in which his convictions for the possession of liquor, as charged in the second count, and for keeping the same liquor for sale, as charged in the first count, can be sustained, for Webb was acquitted on both of those counts.

Peo. vs. *Munroe,* 190 N. Y. 435, 83 N. E. 476.

SIXTH. The comment by the United States Attorney on the fact that Brooks had not testified was prejudicial misconduct.

Under the laws of the United States it is provided that a person accused of crime shall, at his own request, but not otherwise, be a competent witness. "And his failure to make such request shall not create any presumption against him."

Act March 16, 1876, c 37 20 St 30.

> Such a statutory provision prohibits any comment by prosecuting attorney on his failure to testify.

Wilson vs. *U. S.,* 149 U. S. 60:

The error of such misconduct can not be cured even where the court checks the prosecuting attorney and instructs the jury to disregard the statement.

> It was error for counsel to comment upon or allude in any way to the fact that defendant had refrained from testifying. Such misconduct should work a reversal even where the court promptly upon objection checks counsel and instructs the jury to disregard the statement, as was done in this case. We are unable to see that the prejudicial impression irresistibly made upon the minds of the jury can be removed by anything the judge may say or do, after the mischief is done.

Peo. vs. *Morris,* 3 Cal. App. 1, per Chipman P. J.

The theory that a court can remove from the minds of a jury the effect of a statement on the part of the State's attorney referring to the failure of the accused to testify in his own behalf is illusory, and not sustained by common experience. Jurors, however much they are inclined to do so, would find it difficult to efface from their minds the impression made by the remarks of counsel *and reinforced by the instructions of the court again calling to their minds the same fact, though given for the purpose of cautioning them from being influenced by counsel's remarks. The only safe rule, therefore, when counsel for the State has so far overstepped his duties as to call to the attention of the jury the fact that the accused has not taken the stand or offered himself as a witness, is to grant a new trial.*

State vs. *Williams,* 11 So. Dak. 64.

Where prosecuting attorney referred to fact that accused did not testify, the error was not cured by the court checking attorney and instructing jury to disregard what he had said.

Long vs. *State,* 56 Ind. 182.

We have reverted to the foregoing anticipating that the Government's counsel may attempt to argue that the error was cured by the court's remark: "That the jury would be hereafter instructed that the failure of the defendant, Brooks, to take the stand is not in any way to be considered against him, that is his privilege."

There are cases where it has been held that a reprimand to the prosecuting attorney and a direct,

unqualified admonition to the jury to disregard his statement corrected the error. Such cases are not supported by any clear reasoning such as is set forth in the foregoing excerpts from decisions to the contrary. However, the Government can not derive any comfort here from their authority, for the court did not check, did not reprimand the United States Attorney and did not admonish the jury to disregard his remark. The language of the court on this occasion is as objectionable as in *Wilson* v. *U. S. Sup.*

> MR. JUSTICE FIELD. When counsel for defendant called the attention of the court to the language of the district attorney it was not met by any direct prohibition or emphatic condemnation of the court, which only said: "I suppose the counsel should not comment upon the defendant not taking the stand." It should have said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify. The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to prejudice the jury and this effect should be corrected by setting the verdict aside and awarding a new trial.
>
> *Wilson* vs. *U. S. Sup.*

With all due respect to the court below, we think the whole case shows on the part of the court, of the United States Attorney and of the prohibition agents a strong indifference to constitutional rights.

We find an information made by no one and for which no one is responsible; an illegal search and

seizure; refusal by the court to suppress evidence so obtained; refusal by the court to strike out evidence when the unconstitutional nature of the proceedings are demonstrated by the uncontradicted evidence of the agents themselves; misconduct of the United States Attorney unrebuked by the court and without admonition to the jury to disregard it.

And in addition we find a man convicted on three counts and sentenced to heavy fine and long imprisonment where the evidence against him is so slight as to be unworthy to be characterized as vague suspicion.

All of which is respectfully submitted.

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